



QUICK GUIDE

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The minimum age of criminal responsibility in Australia: a quick guide

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Law and Bills Digest

In all Australian jurisdictions, a child under 10 years cannot be found guilty of a criminal offence. This is generally consistent with standards in common law countries. Between 10 and 14 years, the prosecution must prove that the child knew their conduct was wrong before they can be convicted of an offence (called the doctrine of *doli incapax*). Despite it being part of the law in all jurisdictions, not all jurisdictions have included the doctrine in relevant legislation. This means the application of *doli incapax* in practice is not uniform across Australian states and territories.

This quick guide looks at the current status of the law in each jurisdiction, including recent reviews. It also discusses criticisms of Australia's minimum age of criminal responsibility by human rights advocates and the international community.

Current status of the law

The Common Law

The common law presumes that a child under 14 years of age is *doli incapax* (from the Latin 'incapable of deceit'), meaning that they are considered to lack the capacity to be criminally responsible for their acts. If a child is between the ages of 10 and 14 years, this presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the act.

In [RP v The Queen \(2016\)](#) the High Court of Australia found that the prosecution's evidence was insufficient to rebut the *doli incapax* presumption, and stated:

What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience...Rebutting [the *doli incapax*] presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not. [para 12]

The Commonwealth

Under the [Crimes Act 1914](#) (Cth) (*Crimes Act*), the minimum age of criminal responsibility for Commonwealth offences is 10 years of age.

Section 4M of the *Crimes Act* provides that a child under 10 years old cannot be liable for an offence against a law of the Commonwealth. Section 4N(1) provides that a child aged 10 years or more but under 14 years old can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong, and section 4N(2) specifies that ‘whether a child knows that his or her conduct is wrong is one of fact’. The burden of proving that the child has *sufficient capacity* to know that the act/omission was one they ought not to do or make is on the prosecution, using evidence such as medical records, school reports, any police interviews with the child et cetera.

Reviews and legislative change

The Council of Attorneys-General (CAG) [announced](#) on 23 November 2018 that a working group would be established to examine whether to raise the age of criminal responsibility. This body subsequently became the [Meeting of Attorneys-General](#) (MAG), made up of Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice.

On 14 October 2019, Rebekha Sharkie MP introduced the [Crimes Legislation Amendment \(Age of Criminal Responsibility\) Bill 2019](#). This Bill was to amend the *Crimes Act* and the [Criminal Code Act 1995](#) (Cth) to increase the minimum age of criminal responsibility for Commonwealth offences from 10 years of age to 14 years of age. The Bill proceeded to second reading stage but was not passed.

In December 2019, the CAG called for submissions to the working group. These submissions have not been released to the public by the CAG, but the [#RaiseTheAge](#) organisation has published 48 of the submissions on [its website](#). In addition to making a submission to the working group, the Law Council of Australia [published a joint policy statement](#) with the Australian Medical Association on raising the minimum age of criminal responsibility to 14 years of age.

When asked about raising the age of criminal responsibility, [Attorney-General Michaelia Cash](#) told the Senate Legal and Constitutional Affairs Legislation Committee in October 2021 that:

... it's a matter for each jurisdiction individually as to whether or not to raise the minimum age. This is primarily a matter for states and territories, so it's not about all the states and territories ultimately agreeing. They can actually do it individually should they wish to ... at 18 October 2021, there are actually no young people under the age of 14 in detention, sentenced or awaiting sentence for Commonwealth offences ... (p. 114).

The [MAG subsequently advised on 15 November 2021](#) that:

State Attorneys-General supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements (p. 4).

New South Wales

Section 5 of the [Children \(Criminal Proceedings\) Act 1987](#) provides that it ‘shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.’ Additionally, the [Young Offenders Act 1997](#) (*Young Offenders Act*) defines a child as being a person over 10 years and under the age of 18 years. The common law position regarding children between the ages of 10 years and 14 being entitled to the *doli incapax* presumption is not enshrined in NSW legislation.

The *Young Offenders Act* does, however, impose different conditions for children over 14 years of age in some circumstances. Children under the age of 14 must have an adult who is responsible for

the child or a lawyer present for admissions of offences and explanations relating to cautions or conferences to be valid under the *Young Offenders Act*. If a child is 14 years or older, these admissions and explanations can also take place in the presence of an adult chosen by the child.

Case law

The common law and relevant legislation were recently considered by the NSW Children's Court in [Police v CO \[2020\]](#). Criminal charges against a young person for shoplifting were dismissed as the court considered that a warning given for a prior attempted offence was not 'sufficient to establish the Young Person's knowledge that her conduct was something more than just naughty or mischievous' (para 35).

Reviews and legislative change

A [NSW Parliamentary committee](#) investigating Aboriginal incarceration [recommended in April 2021](#) that the age of criminal responsibility be raised from 10 to 14 years old to reduce the rate of imprisonment (recommendation 11). In its [response](#), the NSW Government advised that 'the age of criminal responsibility is being considered at a national level and was discussed at the Meeting of Attorneys-General in March 2021. NSW supports this process ...'.

MLC David Shoebridge introduced a Private Members Bill, the [Children \(Criminal Proceedings\) Amendment \(Age of Criminal Responsibility\) Bill 2021](#) to the NSW Legislative Council on 11 November 2021, which would have raised the age of criminal responsibility to 14 years. The Bill was not passed.

Victoria

Under section 344 of the [Children, Youth and Families Act 2005](#) (Vic) (*CYF Act*), it is conclusively presumed that a child under the age of 10 years cannot commit an offence. The definition of child in the *CYF Act* includes 'a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years' but does not include a person who was 'of or above the age of 19 years when a proceeding for the offence is commenced in the Court' (subsection 3(1)).

As with NSW, the *doli incapax* presumption is not included in legislation. The *CYF Act* restricts transfers of children under 14 years of age from residential centres to youth justice centres (section 465). The *CYF Act* also applies additional rights and restrictions relating to children under 15 years of age, including:

- a parent of a child under 15 years of age can withdraw consent to an extension of the time limit for filing a charge-sheet after receiving legal advice (subsection 344A(5)(b))
- if the parent of a child under 15 years is not before the court, a hearing for certain indictable offences may be adjourned (subsection 356(2))
- a fine imposed by the court for offences cannot exceed 2 penalty units for a child under 15 years (as opposed to 10 penalty units otherwise) (subsection 373(b))
- a court may make a youth residential centre order for a child aged 10 years or more but under 15 years (section 410).

Case law

In the decision [DPP v Martin \(a Pseudonym\) \(2019\)](#), the Victorian Supreme Court, Court of Appeal considered evidence led in the trial of an adult of actions they committed as a child. The court held that the prosecution did not have to rebut the presumption of *doli incapax* in respect of these actions as the evidence was only led as context to the separate adult offences before the court.

Reviews and legislative change

The Legislative Council Legal and Social Issues Committee's [Inquiry into Victoria's criminal Justice System](#) found that Victoria's agreement through the MAG to contribute to a proposal to raise the minimum age of criminal responsibility to 12 was 'out of step with the views and evidence presented by stakeholders who contributed to its Inquiry' and that there was 'overwhelming support for amending s 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the minimum age of criminal responsibility in Victoria to at least 14 years old' (p. 125). The Victorian Government's response to this report [is due on 24 September 2022](#).

Queensland

The [Criminal Code Act 1899](#) (Qld) specifies that a person under the age of 10 years is not criminally responsible for any act or omission (section 29(1)). The *doli incapax* presumption is included in section 29(2), which states, 'a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission'.

Section 175 of the [Youth Justice Act 1992](#) (Qld) sets out the sentencing orders that can be made by a judge if a child is found guilty of an offence. Different maximum sentences are applied to children who are between 13 and 15 years of age, and those who are over 15.

Case law

The Childrens (Magistrates) Courts of Queensland decided in [Queensland Police Service v DSL \[2019\]](#) that a 12-year-old child was guilty of animal cruelty. The court considered that a statement made by the child to police established the child knew their actions were morally wrong and rebutted the *doli incapax* presumption. The court noted that 'evidence of statements of the child are highly probative' but their use 'must be approached with caution' (para 45).

Reviews and legislative change

On 12 February 2018, the Queensland Government appointed former Police Commissioner Robert Atkinson to examine and report on a series of youth justice matters. [The 2018 Report on Youth Justice](#) (Atkinson Report) recommended that the Government advocate for raising the minimum age of criminal responsibility to 12 years as part of a national agenda for all states and territories (recommendations 68 and 69).

On 15 September 2021, Michael Berkman introduced a Private Members Bill, the [Criminal Law \(Raising the Age of Responsibility\) Amendment Bill 2021](#), to the Queensland Parliament. The Bill was referred to the Community Support and Services Committee, which concluded [in its 2022 report](#) that the Bill should not be passed as 'there is more work to be done before the minimum age of criminal responsibility is raised in Queensland' (p.7).

Northern Territory

Section 38(1) of the [Criminal Code Act 1983](#) (NT) states that a person under the age of 10 years is excused from criminal responsibility for an act, omission or event. The *doli incapax* presumption is included in section 38(2), which states that a person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.

A youth is defined in the [Youth Justice Act 2005](#) (NT) (YJA Act) as being a person under 18 years of age or a person apparently under 18 years of age. A person who committed an offence as a youth

but has since turned 18 years of age is also considered to be a youth for the purposes of this Act and the [Bail Act 1982](#) (NT).

In the *NT YJA Act*, there are different requirements for older children in some circumstances. For example:

- section 125 sets out maximum terms of detention or imprisonment for those under 15 years of age (125(2)(b)(ii)), and those over 15 years of age (125(2)(b)(i))
- if an offence is committed after a youth turns 15 years of age, that offence can be taken into account by all courts (that is, not just the Youth Justice Court) (section 136(2)(b)).

Case law

In [RJ v Dunne \(2021\)](#), the Supreme Court of the Northern Territory considered whether a finding that the prosecution had rebutted the presumption of *doli incapax* could be sustained in light of new evidence of the child's circumstances.

The court found that a medical report filed after the hearing established the child's 'understanding of the wrongfulness of her conduct is likely to only be a superficial one...and was unlikely to have been underpinned by any deeper or more meaningful understanding of the construct of criminal responsibility' (para 24). The child's convictions were therefore quashed.

Reviews and legislative change

A [recommendation](#) of the [Royal Commission into the Protection and Detention of Children in the Northern Territory](#) was to raise the age of criminal responsibility from 10 years to 12 years. This recommendation was [supported in principle by the NT Government](#) but is yet to be implemented.

Western Australia

Section 29 of the [Criminal Code Act Compilation Act 1913](#) (WA) states that 'a person under 10 years is not criminally responsible for any act or omission', and 'a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission'.

The [Young Offenders Act 1994](#) (WA) defines a young person as being a person who has not reached the age of 18 years (section 3). The Act applies to a person who commits or allegedly commits an offence before reaching the age of 18 years (section 4).

This Act also provides that:

- a young person over the age of 16 years can be held in a prison for adults, but cannot share living quarters with an adult (section 7)
- sections 50, 50A and 50B provide for different sentencing options for a young person aged under 17, aged 17 but not yet 18, and aged over 18 or over at the time of sentence.

Case law

In [Rye v The State of Western Australia \(2021\)](#), the Supreme Court of Western Australia acquitted a person who was 13 years old at the time of offending on the basis that there was insufficient evidence of the person's capacity at the time.

Justice Vaughan stated of the requirement for a child to have capacity to know that he ought not to do the act or make the omission means that a child must have 'the capacity to know that the act or omission is wrong by the normal adult standards of a reasonable person' (paragraph 92).

Reviews and legislative change

Western Australian Labor [passed a motion to raise the age of criminal responsibility](#) from 10 years to 14 years at their state conference on 2 October 2021. The WA Government has yet to act on this motion, [with the Attorney-General recently advising the legislative council](#):

At the meeting of Attorneys General held on 12 November 2021, all state Attorneys General supported the development of a proposal to increase the minimum age of criminal responsibility from 10 years to 12 years, including with regard to carve outs, timing and discussion of implementation requirements.

South Australia

Section 5 of the [Young Offenders Act 1993](#) (SA) provides that a person under the age of 10 years cannot commit an offence. This Act defines a youth as a person of or above the age of 10 years but under the age of 18 years and includes a person who was under the age of 18 years on the date of the alleged offence (section 4). Except for providing that offenders over 17 years of age can be transferred to a prison under some circumstances (section 63), the Act does not distinguish between older and younger children.

Case law

In [R v ADC \(2021\)](#), the Supreme Court of South Australia reviewed a refusal to grant bail to a 13 year old child by a District Court judge. When granting bail to the child, the court noted a relevant consideration was the likelihood of the prosecution being able to rebut the presumption of *doli incapax* with respect to a child who has a significant cognitive impairment.

Reviews and legislative change

South Australia has not taken any action independently of the Meeting of Attorneys-General to raise the age of criminal responsibility.

Attorney General Vickie Chapman [commented](#):

My preference has always been that we pursue a nationally consistent approach to the minimum age of criminal responsibility ... I will continue to discuss this matter with my colleagues interstate and nationally, as well as work with those on the ground in South Australia who best understand the system and possible implications of change.

Tasmania

Under section 18 of the [Criminal Code 1924](#) (Tas) no act or omission done or made by a person under 10 years of age is an offence, and no act or omission done or made by a person under 14 years of age is an offence, unless it is proved that they had sufficient capacity to know that the act or omission was one which they ought not to do or make.

Children in Tasmania are generally dealt with under the [Youth Justice Act 1997](#) (Tas). A youth is defined in this Act as being a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred (section 3).

The Youth Justice Division of the Magistrates Court does not have jurisdiction to hear matters involving youths who have committed a prescribed offence (see sections 3 and 161 of the *Youth Justice Act 1997*). Which offences are defined as being prescribed offences for children aged under 14, aged between 14 and 16, and those aged 17 years. Children who have committed a prescribed offence are tried as adults in the Supreme Court in accordance with the [Justices Act 1959](#).

Case law

The Supreme Court of Tasmania (Court of Criminal Appeal) considered the sentencing of a 17 year old in [Director of Public Prosecutions v J S P \(2020\)](#). The court stated:

It is true that the justification for the principles governing the sentencing of youthful offenders is that such offenders are not able to appreciate the nature and extent of their criminality. They are more likely to make ill-considered and immature decisions. At the same time...the importance of rehabilitation of a youthful offender is usually far more important than general deterrence, but that there are cases in which just punishment and general deterrence become at least equally important. (para 26)

Reviews and legislative change

On 26 October 2021, [a motion in the Legislative Council](#) to raise the minimum age of criminal responsibility in Tasmania from 10 to 14 was agreed to.

Elise Archer, the Tasmanian Attorney-General, [told the House of Assembly on 24 November 2021](#):

We have said on a number of occasions that we want to work in a nationally consistent way. We were pleased that at the meeting on Friday 12 November, the Attorneys-General agreed to support the development of a proposal to increase the age of criminal responsibility from 10 years to 12 years, which will include consideration of carve-outs and timing, as well as a discussion of implementation supports.

Australian Capital Territory

Section 25 of the [Criminal Code 2002](#) (ACT) currently provides that a child under 10 years old is not criminally responsible for an offence, and section 26 states that a child aged 10 years or older, but under 14 years old, can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

Young offenders in the ACT are dealt with under the [Children and Young People Act 2008](#) (ACT). For this Act:

- a child is defined as a person who is under 12 years old (section 11)
- a young person means a person who is 12 years or older, but not yet an adult (section 12)
- a young offender is a person who has been convicted or found guilty of an offence and they were under 18 years old when the offence was committed (section 3: Dictionary)
- a person who is at least 18 years old but under 21 is still considered to be a young detainee if the person was under 18 years old at the time the relevant offence was committed (section 95(2)), but different requirements regarding separation from adult detainees apply (see, for example, section 100).

Case law

In [UD v Bishop \(2021\)](#) the full court of the Supreme Court of the ACT considered whether a child defendant must provide evidence that they did not know that their conduct was wrong to raise the issue of *doli incapax*. The court found that the ACT Code only placed a burden of proving the appellant knew his conduct was wrong upon the prosecution, and there was no evidential burden upon the child.

Reviews and legislative change

On 20 August 2020, a [motion to raise the age of criminal responsibility](#) from 10 to 14 years of age was passed by the ACT Legislative Assembly.

The [Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory](#) was subsequently commissioned in 2021 by the ACT Justice and Community Safety Directorate to assess the changes required for raising the minimum age of criminal responsibility. The final report of the Review was published in August 2021.

The legislation to raise the age of criminal is [reported to have stalled](#) pending decisions on when to introduce the legislation and what form it will take.

Criticism of Australia's minimum age of criminal responsibility

International criticism

The [United Nations Committee on the Rights of the Child](#) in 2019 formally noted its serious concern about the 'very low age of criminal responsibility' in Australia. The Committee called on Australia to raise the minimum age of criminal responsibility to an 'internationally accepted level and make it conform with the upper age of 14 at which *doli incapax* applies' (p. 13).

The [Summary of Stakeholders Submissions](#) to the UN's Universal Period Review (UPR) Working Group contained calls from a variety of stakeholders, including the [Australian Human Rights Commission](#) (AHRC), that the minimum age of criminal responsibility be raised to at least 14 years. During the UPR Working Group session, [31 countries recommended that Australia raise the minimum age of criminal responsibility](#) (p. 16-17).

[Amnesty International's Report 2021/22](#) was published on 29 March 2022. It was noted in the report that the ACT had committed to increase the minimum age of criminal responsibility to 14, but 'Australia continued to detain children as young as 10 years old' (p. 79).

Criticism from Australian stakeholders

The AHRC found in its 2019 report [In Their Own Right: Children's Rights in Australia](#) that there is limited evidence the *doli incapax* principle is properly applied in practice to avoid unnecessary incarceration of children.

Several Aboriginal-led, medical, legal and human rights organisations, are [continuing to pressure Australian Governments](#) to increase the minimum age of criminal responsibility to 14 years of age. Major campaigns include [Change the Record](#) and [#RaiseTheAge](#).

Change the Record is an 'Aboriginal led justice coalition of Aboriginal peak bodies and non-Indigenous allies' which is working to 'end the incarceration of, and family violence against, Aboriginal and Torres Strait Islander people'. They argue that 'when a child is under the age of 14, they haven't yet developed the capacity to assess risk, predict consequences or control their impulses. They are simply too young.'

The #RaiseTheAge campaign was developed by a coalition of legal, medical and social justice organisations to call on the government to raise the age of criminal responsibility to at least 14 years old.

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